

SERVICE DATE - AUGUST 7, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42081

DYNO NOBEL INC.

v.

KANEB PIPE LINE PARTNERS, L.P.

MOTION FOR PROTECTIVE ORDER

Decided: August 6, 2003

On June 16, 2003, Dyno Nobel Inc. (Dyno) filed a complaint with the Board challenging certain rate increases made by Kaneb Pipe Line Partners, L.P. (Kaneb) with respect to pipeline shipments of anhydrous ammonia. By joint motion filed July 18, 2003, the parties seek a protective order under 49 CFR 1104.14(b). They have agreed upon its proposed terms. According to the parties, the proposed protective order is necessary to protect the confidentiality of sensitive financial information and other proprietary information in the event these materials are included in evidentiary filings in this proceeding.

The proposed order, as set out in the Appendix, is consistent with the protective orders entered by the Board in recent rate proceedings.<sup>1</sup> It includes provisions governing the production of Highly Confidential material and stipulates that the protected exchange of material will not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904. It also includes provisions incorporating modifications to those orders as required by another recent Board decision which addressed, among other things, protective orders in rate cases.<sup>2</sup> Although not mentioned in the protective order, parties are required by Board rule to file a public version of all submissions to the

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<sup>1</sup> See, e.g., Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071 (STB served Mar. 6, 2002); Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070 (STB served Feb. 5, 2002); Arizona Public Service Company and PacifiCorp v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42077 (STB served Feb. 20, 2003).

<sup>2</sup> Procedures to Expedite Resolution of Rate Challenges to Be Considered under the Stand-alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003), reconsideration denied (STB served July 31, 2003).

Board simultaneously with the submission of any Highly Confidential or Confidential version in these cases.

Good cause exists to grant the motion for a protective order. The unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury. Issuance of the requested protective order will ensure that the material, produced in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose. The motion conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain confidentiality of materials submitted to the Board and the rules at 49 CFR 1114.21(c) for a protective order regarding discovery. Accordingly, the motion for a protective order will be granted.

It is ordered:

1. The joint motion for a protective order is granted.
2. The parties are directed to comply with the protective order set forth in the Appendix to this decision.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary

## **APPENDIX**

### **PROTECTIVE ORDER**

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to another party’s outside counsel of record in this proceeding, and to those individuals working with or assisting such counsel who are not regular employees of the party and have a need to know, review, or handle the Highly Confidential material for purposes of the proceeding, including testifying and consulting experts, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.

3. Each Undertaking for Confidential Material and Undertaking for Highly Confidential Material executed by a person authorized to receive access to Confidential Material or Highly Confidential Material shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such person is affiliated or associated, and a copy of each such Undertaking shall be served upon counsel of record for each party no later than 10 days after such Undertaking is executed.

4. Confidential and Highly Confidential material shall be used by a receiving party solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

5. Confidential and Highly Confidential material that is not the receiving party’s own data, information, or documents must be destroyed by the receiving party, its employees, counsel, and agents

at the completion of this proceeding and any judicial review proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which they received during the course of this proceeding.

6. Confidential and Highly Confidential material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order” or “Highly Confidential Materials Subject to Protective Order.” See 49 CFR § 1104.14.

7. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to stamp the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving parties with properly designated material.

8. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other parties return the inadvertently produced privileged document. The parties who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

9. If any party intends to use Confidential and/or Highly Confidential material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential and/or Highly Confidential material to any Administrative Law Judge, the Board, or the court, with a written request that the Administrative Law Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

10. If any party intends to use Confidential and/or Highly Confidential material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any such Confidential and/or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential and/or Highly Confidential material shall be kept under seal and treated as Confidential and/or Highly Confidential material in accordance with the terms of this Protective Order.

11. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

12. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential material, Highly Confidential material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.

13. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.

14. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

15. A "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate decision of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

16. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party.

17. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing the filing party’s Highly Confidential material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party’s Highly Confidential material has been redacted. The Confidential Version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material (“In-house Personnel”). Alternatively, in lieu of preparing and serving a Confidential Version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party’s own Highly Confidential information that must be redacted from its Highly Confidential version prior to review by the reviewing party’s In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the Highly Confidential verison, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party’s In-house Personnel.

**UNDERTAKING**

**CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on August 7, 2003, governing the production of confidential documents in STB Docket No. 42081, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42081 or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_

Dated: \_\_\_\_\_

## **UNDERTAKING**

### **HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served on August 7, 2003, governing the production of confidential documents in STB Docket No. 42081, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in STB Docket No. 42081 and any judicial review proceeding arising therefrom, that I will take all necessary steps to ensure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the highly confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

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OUTSIDE [COUNSEL][CONSULTANT]

Dated: \_\_\_\_\_